MOTION FILED
AUG 5 1981

No. 80-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

—against—

WILLIAM R. PHILLIPS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION *AMICI CURIAE*

CHARLES S. SIMS,
Counsel of Record
BRUCE J. ENNIS, JR.
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

RICHARD M. ZUCKERMAN
345 Park Avenue
New York, New York 10154
(212) 644-8007

Attorneys for *Amici Curiae*

August 1, 1981

MOTION FOR LEAVE TO FILE

The American Civil Liberties Union and the New York Civil Liberties Union hereby respectfully move for leave to file the attached brief *amici curiae*. The attorney for respondent has consented; the attorney for petitioner has refused consent.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights. The New York Civil Liberties Union is its statewide affiliate operating in New York.

Central to the principles in the Bill of Rights is the Sixth Amendment right to a trial "in all criminal prosecutions . . . by an impartial jury."

The need for protection against overreaching government action -- the central purpose

of the Bill of Rights -- is greatest when the government brings criminal charges against a defendant. As this Court has noted,

> "Those who emigrated to this Country from England brought with them this great privilege[, the right to trial by an impartial jury,] 'as their birth right and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"*

The ACLU has participated in numerous cases in this Court which have concerned the Sixth Amendment right to trial by jury, including Burch v. Louisiana, 441 U.S. 130 (1979), Apodaca v. Oregon, 406 U.S. 404 (1972), and Witherspoon v. Illinois, 391 U.S. 510 (1968).

Although we share the concern of the courts below and respondent over the implied bias

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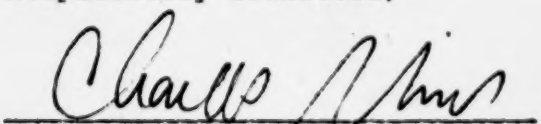
* Thompson v. Utah, 170 U.S. 343, 349-350 (1898), quoting 3 J. Story, Commentaries on the Constitution of the United States (Boston: 1833), § 1773.

of the juror at issue here, and the apparent prosecutorial misconduct which the prosecutor here seeks for the first time to defend (Br. at 27), our approach is somewhat different. We focus on the particular reasons why the juror here would have found it immeasurably more difficult to admit bias after trial than during trial, and on the marked constriction of the trial judge's alternatives the prosecutor effected by waiting until after trial to disclose the juror's application for a job with his office. Finally, we rely on United States v. Agurs, 427 U.S. 97 (1976), to demonstrate that a different standard must govern prosecutorial failure to disclose likely juror bias known but concealed during a trial than governs post-trial discovery of such bias to give effect to the prosecutor's obligation to serve the ends of justice.

Because this case raises important questions concerning the right to due process and fair jury trial, we respectfully urge the the Court to accept and file the enclosed brief amici curiae.

Dated: August 1, 1981

Respectfully submitted,



CHARLES S. SIMS,
Counsel of Record
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 644-8007
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

The interest of amici curiae appears in the foregoing motion.

SUMMARY OF ARGUMENT

The District Attorney's decision not to disclose until after trial that a juror had applied for a job in his office prevented the state court from conducting a hearing, during trial, to determine whether the juror was impartial, and also prevented the state court from replacing the juror with an alternate.

Where, as here, a hearing during trial would have been possible, and the nature of the alleged juror misconduct is such that a post-trial hearing is far less likely to result in an accurate determination of whether the juror was prejudiced, a post-trial hearing falls short of the requirements of due process, and is inadequate

to protect the right to trial by an impartial jury. The post-trial hearing conducted by the state court was inadequate, and did not eliminate the likelihood that the juror's pending job application affected his judgment as a juror.

ARGUMENT

THE WRIT OF HABEAS CORPUS WAS PROPERLY GRANTED BECAUSE, IN THE CIRCUMSTANCES OF THIS CASE, THE PROSECUTOR'S DECISION NOT TO DISCLOSE DURING TRIAL THAT A JUROR WAS APPLYING FOR A JOB IN HIS OFFICE DENIED DEFENDANT DUE PROCESS AND UNNECESSARILY ABRIDGED THE ABILITY OF THE TRIAL COURT TO MAKE AN ACCURATE AND RELIABLE ASSESSMENT OF WHETHER THE JUROR WAS SO PREJUDICED AS TO DENY DEFENDANT A FAIR TRIAL

By deciding not to advise the state trial judge until after trial that a juror had a job application pending in the prosecutor's office, the District Attorney prevented the state court from conducting a hearing during trial to determine whether the juror was impartial, and also

prevented the court from excusing the juror and replacing him with one of three available alternates. The District Attorney instead relegated the state court to conducting a post-trial hearing which, as we shall show, was unlikely, under the circumstances of this case, to adduce credible or reliable evidence on the juror's impartiality.

The District Attorney's actions prevented the state court from determining, in a Constitutionally-adequate manner, whether the juror was impartial, and denied respondent due process in his criminal trial. U.S. Const., Amendments VI, XIV.

Although acknowledging that his office engaged in "wrongful conduct" (Pet. Br. at 48), the District Attorney contends that the state court's post-trial hearing into the juror's impartiality (at which the court concluded that the juror was not prejudiced) remedied any violation of respondent's rights:

> "If we assume that the prosecutor had himself discovered the letter [the job application] only after the verdict, a post-trial hearing would have been the proper means of determining whether the juror had been actually biased. [citations omitted]. If a post-trial hearing would have been adequate to protect Phillips' sixth amendment right to an impartial jury in that circumstance, there is no reason why such a hearing was any less adequate simply because the prosecutors knew about the letter at an earlier point in time." (Pet. Br. at 27).

This argument -- which is the keystone of petitioner's brief -- was unequivocally rejected by this Court in United States v. Agurs, 427 U.S. 97, 111 (1976), which compared the standard applicable to post-trial motions based on the prosecutor's failure to disclose evidence, with the standard applicable to post-trial motions based on newly-discovered evidence:

> "The fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. . . . If the standard applied to the usual motion for a

> new trial based on newly-discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."

In affirming the grant of habeas corpus in this case, the Second Circuit noted that Agurs established a three-tiered standard to evaluate the prosecutor's failure to disclose evidence: (a) if the undisclosed evidence shows that the prosecutor's case included prejudiced testimony, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," Phillips v. Smith, 632 F.2d 1019, 1023 (2d Cir. 1980), citing United States v. Agurs, supra, 427 U.S. at 103-104; (b) if the undisclosed evidence was requested by the defense, and if there is "a substantial basis for claiming materiality, . . . the failure to [disclose] is seldom, if ever, excusable," Phillips v. Smith, supra, citing Brady

v. Maryland, 373 U.S. 83 (1963); and (c) if the undisclosed evidence was not requested, a verdict must be set aside if the evidence "creates a reasonable doubt which did not otherwise exist," Phillips v. Smith, supra, citing United States v. Agurs, supra, 427 U.S. at 112.

Where, as here, the information withheld by the prosecutor was not evidence which could have been introduced at the trial, but information which raised a substantial question about the impartiality of a juror, the prosecutor's failure to disclose should be evaluated by the same standard as the prosecutor's use of perjured testimony. Like perjured testimony, juror prejudice known to the prosecutor involves not only "prosecutorial misconduct, but more importantly . . . a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. at 104. Like the higher standard which applies to failure to disclose

evidence but not to newly discovered evidence, a higher standard must govern failure to disclose likely juror prejudice to signify the importance of "the prosecutor's obligation to serve the cause of justice." Id. at 111.

The question therefore is whether there is "any reasonable likelihood that" the juror's pending job application with the District Attorney's office "could have affected the judgment of the jury." United States v. Agurs, supra, 427 U.S. at 103 (emphasis added).

This question is difficult to answer in any case, for while there may be many witnesses and varied evidence on the source of the alleged juror bias, there is only one witness who can give direct evidence on its impact: the juror himself. Such evidence is inherently unreliable. As this Court stated in Irvin v. Dowd, 366 U.S. 717, 728 (1961),

"No doubt each juror was sincere when

> he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

This question is all the more difficult to answer in this case because by withholding the information about the juror's job application until after trial, the prosecutor took it upon himself to deprive the court of the most effective means of assessing whether the juror was impartial -- a hearing during the trial -- and thereby also, we will now show, deprived the court of the least disruptive remedy for ensuring a fair trial when a juror is prejudiced -- replacing the juror with an alternate.

A post-trial hearing might ordinarily be adequate to

> "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." Remmer v. United States, 347 U.S. 227, 230 (1954).

But under the facts of this case, the post-trial

hearing was wholly inadequate to assess whether the juror was impartial, for several reasons.

First, just as juror Smith may have had a motive, during trial, to vote for conviction to further his law enforcement career, after trial he clearly had a motive to say that he had not done so. For it must have been evident to juror Smith that if he admitted bias -- if he admitted that he had disregarded his oath as a juror to further his law enforcement career -- it would have had a devastating effect on that career. What law enforcement agency would hire an investigator whose credibility could always be impeached by his admission that he had disregarded his solemn juror's oath, and voted to convict to further his own career?

Had the hearing into juror Smith's impartiality been held during trial, the juror would have been under no such pressure to proclaim his impartiality. He could then have testified,

if it were so, that his pending application for a job with the prosecutor would influence his ability to serve as a juror, without fear that that forthright statement would imperil his future career.

The facts underlying juror Smith's alleged bias thus distinguish this case from Remmer v. United States, supra, which held a post-trial hearing adequate to determine whether a juror, who had been interviewed by the FBI during trial about an alleged attempted bribe, was affected in his deliberations. In Remmer, the juror had no motive, either during or after trial, to justify his conduct, for there was no claim that the juror had engaged in misconduct. The juror's testimony at a post-trial hearing was thus as reliable as the juror's testimony at a hearing during trial. Had the juror acknowledged that he had been influenced by the FBI interview or the alleged attempted bribe, his testimony would have

cast aspersions on the FBI and the source of the attempted bribe, but not on himself.

Indeed, the cases relied upon by the District Attorney on "the appropriateness of post-verdict inquiry" (Pet. Br. at 26) did not involve claims of juror misconduct, but instead claims that a third party had improperly influenced the juror. See, e.g., United States v. Johns, 615 F.2d 672, 676 (5th Cir.), cert. denied, ___ U.S. ___, 101 S. Ct. 95 (1980) (alternate juror learned about witness' death); United States v. Gross, 614 F.2d 365, 368 (3d Cir.), cert. denied, 447 U.S. 925 (1980) (marshall expressed romantic interest in female jurors); United States v. Brasco, 516 F.2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975) (jurors noticed newspaper article).

In those cases, where the juror was not himself suspected of misconduct, there was no reason to believe his testimony at a hearing after trial would be any less reliable than his

testimony at a hearing during trial.

In contrast, juror Smith had a clear motive after trial to justify his conduct, and would have had no such motive during trial.

Second, a post trial hearing is inferior to a hearing during trial because the only option then available to the judge is to set aside the guilty verdict, rather than merely to replace the juror with an alternate, with no substantial inconvenience to witnesses or burden on judicial resources.

Furthermore, the District Attorney has implicitly acknowledged that the prosecutor made a serious error of judgment largely to avoid the minimal delay that raising this issue during trial would have occasioned:

> "To be sure, as the state judge found, by failing to disclose the letter during trial, the trial prosecutor had made a 'serious error in judgment.' (App. E at 52a). Nonetheless, the decision not to disclose was made in the sixth week of a murder trial in the middle of cross-examining

> defendant, with the summation only a week away and with knowledge of a problem with another juror -- Bethel. (Pet. Br. at 31 n. 11.; emphasis added).

If a brief delay in trial led the prosecutor to commit a "serious error of judgment" (Pet. Br. at 31 n. 11), it is clear that a trial judge must feel even greater pressures at a post-trial hearing when the only remedy would be to set aside the conviction and begin a new trial. Accordingly, where it is possible, a hearing during trial, when a prejudiced juror may be replaced by an alternate and a new trial thus avoided, is infinitely more effective than a post-trial hearing.

Not only does the District Attorney fail to address these serious infirmities of a post-trial hearing, but he attempts to rationalize that a post-trial hearing may be more effective than a hearing during trial. First, the District Attorney argues that at a hearing after trial, "defense counsel, in cross-examining the juror,

would not have to tread lightly in fear that, if his challenge were unsuccessful, he would then be stuck with a juror who might well hold the cross-examination against his client." (Pet. Br. at 27-28). But the task faced by defense counsel, at a hearing during trial, is hardly novel. In New York state courts, the voir dire of the jury is conducted by the attorneys, not by the court. N.Y. Crim. Proc. Law §§ 270.15, 360.20 (McKinney's 1971). A defense counsel who has exhausted his peremptory challenges, and examines a juror to determine if there is a basis to challenge for cause, knows that if there is no such basis "a juror who might well hold the cross-examination against his client" will serve on the jury. The District Attorney's post-hoc rationalization of the defendant's interests is, of course, no substitute for the timely assessment of the defendant's interests, by his own counsel, which the District Attorney prevented.

The District Attorney's second rationalization to support a post-trial hearing is that "at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern." (Pet. Br. at 28). But there is no reason to assume that the court would not have given adequate time to a hearing during a seven-week trial had the prosecutor not prevented it from so doing.

To be sure, a post-trial hearing may be Constitutionally adequate where the testimony at such a hearing would be as reliable as testimony taken at a hearing during trial. A post-trial hearing may also be adequate if it is not possible to hold a hearing during trial. But where, as in this case, a hearing during trial would have been possible, and the nature of the alleged misconduct is such that a post-trial hearing is less likely to result in an accurate determination of whether the juror was prejudiced, then a post-trial

hearing falls short of the requirements of due process, and is inadequate to protect the right to trial by an impartial jury.

The post-trial hearing in this case could not, and did not, eliminate "any reasonable likelihood" that the juror's pending job application "could have affected [his] judgment." United States v. Agurs, supra, 427 U.S. at 103.

Because the post-trial hearing was inadequate, the state court's conclusion that juror Smith was not biased -- based almost solely on juror Smith's own testimony -- is not entitled to deference. 28 U.S.C. § 2254(d)(2),(7). In Remmer v. United States, 350 U.S. 377, 381 (1956), involving another juror also named Smith, this Court held that under the facts of that case,

> "neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror,"

and accordingly disregarded the lower court's finding, made after a post-trial hearing, that

a communication with a juror had not affected his judgment.

* * *

The District Attorney admirably concludes his brief by stating "we seek no vindication for the trial prosecutor." (Pet. Br. at 48). In urging that the judgment below be affirmed, the ACLU seeks no punishment for the trial prosecutor, but merely

> "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, supra, 373 U.S. at 87.

CONCLUSION

Because the prosecutor's decision not to disclose during trial that a juror had applied for a job in his office denied respondent due process, and prevented the state trial judge from holding a Constitutionally-adequate hearing to determine whether the juror was impartial, the writ of habeas corpus was properly granted.

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York
August 1, 1981

Respectfully submitted,

CHARLES S. SIMS,
Counsel of Record
BRUCE J. ENNIS, JR.
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

RICHARD M. ZUCKERMAN
345 Park Avenue
New York, New York 10154
(212) 644-8007

Attorneys for Amici Curiae